IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03/07/2002

CORAM

THE HONOURABLE Mr. JUSTICE V. KANAGARAJ

W.P. No.817 of 2001 and W.P.No. 818 of 2001 and W.P.No. 3155 of 2001
and
W.P.M.P.Nos.1095, 1097 & 4364 of 2001

1. K.V. Mahalingam .... Petitioner in W.P.817/01
2. V. Muthukrishnan .... Petitioner in W.P.818/01
3. K. Venkatraman .... Petitioner inW.P.3155/01

-Vs-

1. The Tamil Nadu Electricity Board rep
by its Chairman, Anna Salai,
Chennai – 600 002.

2. The Superintending Engineer,
Nagapattinam Quaid-e- Milleth District
Electricity Distribution Circle,
Nagapattinam – 611 001.

3. The Assistant Commissioner of Labour,
(Controlling Authority under the payment of
Gratuity Act, 1972), Gaja Nagar, III Street,
Tiruchirapalli – 20.

4. The Joint Commissioner of Labour,
(The appellate authority under the payment
of Gratuity Act, 1972), Madurai.... Respondents in all
the above W.P.s

PETITION under Article 226 of the Constitution of India praying for
the issue of a writ of Certiorarified Mandamus.

For Petitioners: Mr. S.Periyasamy

For Respondents: Mr.V.Radhakrishnan, TNEB -R1 &2
Mr. M. Mahalingam, G.A. - R3

:O R D E R

All the above writ petitions have been filed by the petitioners seeking to issue a writs of Certiorarified Mandamus calling for the records pertaining to the order of the fourth respondent dated 27.1.2000 respectively in P.G. Appeal Nos.60,61 and 62 of 1999 reversing the order of the third respondent passed in P.G. Cases No.25 to 27 of 1997 dated 28.4.1998 and quash the same and consequently, directing the first respondent to pay the gratuity for the period from 01.02.1952 to 14.05.1968 to the 1st and 3rd petitioner and 16.11.1948 to 14.05.1968 to the2nd petitioner.

2. For easy reference and for the sake of convenience W.P.No.817/2 001, W.P.No.818/2001 and W.P.No.3155/2001 are (herein after referred to) as the first, the second and the third writ petition respectively.

3. Though during the first phase of the pleadings regarding the service rendered in the first respondent Electricity Board, the details would differ, the first writ petitioner stating that he joined South Madras Electric Supply Corporation Limited, Trichy as a Clerk on 16.11.1948 and served till 14.05.1968; the second writ petitioner stating that he joined as a Clerk on 19.11.1948 and continued there till 14 .05.1968 and the third writ petitioner would submit that he joined as a Clerk on 01.02.1952 and continued till 14.05.1968 and all of them unequivocally would say, since on 14.05.1968, the Corporation was acquired by the Government of Tamil Nadu and the T.N.E.B. with effects from 19.05.1968, they were absorbed by the T.N.E.B.

4. The petitioners would then submit that there was an agreement between the workers union and the previous employer that employees were entitled to gratuity at the rate of half month's pay for each and every year of service at the time of retirement/death and a sum of Rs.3,09,969/- was provided in the balance sheet of the employer so that he can pay gratuity to the employees, since there is no gratuity scheme for workers at that time. The petitioners would further state that the first and third petitioners above retired from the first respondent's service on 31.03.1985 and the second writ petitioner on 31.10.1987 as T.N.E.B. Employees and they were paid gratuity from 15.05.196 8 till the date of their retirement as mentioned supra omitting their past services of 19 ½ years with the previous employer though there is specific gratuity reserve in the balance sheet.

5. The petitioners would further submit that they filed petition under the Payment of Gratuity Act 1972 before the third respondent in P.G.No.39 of 1984. They would also submit that claim petition filed in C.P.No.107 of 1976 by them having been dismissed, the writ petition filed in W.P.No.1134 of 1972 also came to be dismissed on 19.06.198 6 on account of non-availability of legal basis. They would further submit that by Board's Memo No.900/83/Adm.Br/77-26 dated 25.03.1991, T.N.E.B. issued guidelines to treat the services of the staff absorbed from South Madras Electric Supply Corporation Limited, Trichy as services in the Board and one Mr. Kannan, working as Senior Grade Assistant was paid gratuity for his past services with

the previous employer, by proceedings of the second respondent in SE/TEDC/N/SFm.2/G.27/34 2/93 dated 21.07.1973 and hence the petitioners filed the PG cases before the third respondent claiming gratuity for their entire award of service with 12% interest per annum and the third respondent passed a detailed award as per the common award dated 28.04.1998 granting gratuity to them; that the first respondent preferred separate appeals against each one of the petitioners above respectively in PG appeals No.60,61 and 62 of 1999 with the delay excuse petition for condonation of delay of 181 days and the fourth respondent, the appellate authority allowed the above petition, thereby condoning the said delay, since the appeals should have been preferred within 60 days from the date of the order of the competent authority; that the fourth respondent has no power or authority to condone the delay in filing the appeal beyond 120 days, pursuant to the Judgment of this Honourable Court and hence the order of the fourth respondent, appellate authority is illegal, arbitrary, non-est in law, without jurisdiction and violative of Article 14 of the Constitution of India. On such grounds and on further ground that the fourth respondent also did not properly appreciate the contentions of the petitioner nor any valid reason offered to reverse the considered award passed by the third respondent granting gratuity on the basis of the guidelines of the Electricity Board and on such grounds the petitioners would come forward to file the above writ petitions seeking the reliefs extracted supra.

6. During arguments, the learned counsel appearing on behalf of the petitioners, besides laying emphasis on the pleading of the writ petitions would also cite a Judgment reported in 1991 II LLJ 76 (GURMAIL SINGH AND OTHERS ETC. V. STATE OF PUNJAB AND OTHERS) wherein it is held

" There can be situations in which the Court or Industrial Adjudicator should, in the interest of justice, fair play and industrial peace, hold the employee entitled to continuity with the successor without being compelled to be satisfied with compensation from predecessor. The Supreme Court itself has visualised such a situation and made it clear that if a transfer is fictitious or benami, Sec.25FF has no application at all. In such a case, there has been no change of ownership or Management and despite an apparent transfer, the transferoremployer continues to be the real employer and there has to be continuity of service under the same terms and service conditions as before and there can be no question of compensation. A second type of case is one in which there is in form, and perhaps also in law, a succession but the Management continues to be in the hands of the same set of persons organised differently. In such cases, the transferee and transferee and transferor are virtually the same and the overriding principle should be that no one should be able to frustrate the intent and purpose of the law by drawing a corporate veil across the eyes of the Court. The third category of cases is where the transferor and/ or transferee is a State or State Instrumentality, which is required to act fairly and not arbitrarily and the Court has a say as to whether the terms and conditions on which it proposes to hand over or take over an Industrial Undertaking embody the requisite of 'fairness in action' and could be upheld. In such circumstances it would be open to this Court to review the arrangement between the State Govt and the Corporation and issue appropriate directions. Such directions could be issued even if the elements of the transfer in the present case fell short of a complete sucession to the

business or undertaking of the State by the Corporation as the principle sought to be applied is a Constitutional principle flowing from the contours of Art.14 of the Constitution which the State and the Corporation are obliged to adhere to."

7. Though no counter has been filed to the writ petitions, on behalf of the respondents No.1 and 2, the Special Counsel, Electricity Board would appear and on behalf of the third and fourth respondents, the Government Advocate on the writ side would appear and they would argue the case of the respondents.

8. In consideration of the facts pleaded in the writ petition, having regard to the materials placed on record and upon hearing the learned counsel for all, what comes to be known is that the petitioners have originally joined the South Madras Electric Supply Corporation Limited, Trichy and continued to be its employees till 14.05.1968 and by an order of Government of Tamil Nadu, the said Corporation was acquired by the Government and vested by the Tamil Nadu Electricity Board with effects from 15.05.1968 and, therefore, there had been a technical retrenchment of the services of the petitioners as on 14.05.1968 by the erstwhile South Madras Electric Supply Corporation, Trichy and that on terms and conditions of earlier services they having been absorbed by the T.N.E.B. from the next day that was on 15.05.1968 onwards, as per the agreement dated 22.10.1965 made between the workers union and the previous employer of the South Madras Electric Supply Corporation Limited, Trichy, the workers were entitled to gratuity in the erstwhile company at the rate of half month's wage for each year of service either at the time of retirement or under death and at the time of transition, there had also been necessary gratuity reserves to the tune of three lakhs and ten thousand, so as to pay the company employees their gratuity when they are superannuated or died; that the Electricity Board admitted to give effect of the findings of the arbitrator.

9. These facts are neither denied on the part of the respondents nor would they produce any material contra. However, accepting the case of the petitioners, the competent authority would pass his orders allowing the request of the petitioners thereby directing the respondents to calculate the period of the service rendered by the petitioners in the earlier Corporation, i.e., South Madras Electric Supply Corporation Limited, Trichy. The Controlling Authority to arrive at such conclusions would not only take up the case of the petitioners one by one on facts and circumstances pleaded, but also the counter filed on the part of the respondents herein and having conducted a thorough enquiry based on such pleadings and allowing the parties to record their evidence and appreciating the same in the manner required by law discussing the pleading and the evidence placed on record in the light of the propositions of law held from time to time by the Apex Court, would ultimately arrive at the conclusion holding that for the purpose of calculating the gratuity and to be paid in favour of the petitioners, the service rendered by them in the previous Corporation, which had been acquired by the Government of Tamil Nadu and vested with the Tamil Nadu Electricity Board was taken into consideration.

10. However, a quite contrary stand has been taken on the part of the appellate authority having his own discussions and ending up saying that in the circumstance of the case, the service rendered with the previous Corporation upto 1968 prior to joining the T.N.E.B., since being a different employment and the petitioners having been retrenched within the meaning of the relevant provisions of the Industrial Disputes Act, the petitioners are not entitled to the payment of gratuity counting the previous service rendered in the Corporation also, thus allowing the appeal preferred by the respondents and setting aside the order of the Controlling Authority.

11. The point for consideration in the above circumstances is where the appellate authority is right in holding "that in the circumstance of the case, the petitioners are not entitled to the payment of gratuity counting their previous service rendered in the erstwhile Corporation also?". The main argument advanced for such a conclusion arrived at on the part of the appellate authority is that practically looking into the taking over of the Corporation wherein the petitioners were initially working and vesting the same with the T.N.E.B., they were retrenched from service and their appointments made in the T.N.E.B. was afresh and initially treating them as probationary hands and then confirming their appointments with the Board and on such instances given, the appellate authority would arrive at the conclusion; that the appointment of the petitioners in the Tamil Nadu Electricity Board was a fresh appointment and therefore, it is not necessary on the part of the Board to calculate the services rendered in the erstwhile Corporation by the petitioners for the purpose of payment of gratuity.

12. Under these circumstances, it has become relevant to go into Section 25F, 25FF of the Industrial Disputes Act 1947, whereunder the conditions precedent to retrenchment of workmen, the compensation to workmen in case of transfer of undertakings are to be considered, since it is the service rendered in the previous Corporation, which is relevant for consideration, the same being an admitted fact on the part of the respondents.

"Section – 25F- Conditions precedent to retrenchment of workmen – No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until -

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay (for every completed year of continuous service) or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government (or such authority as may be specified by the appropriate Government by notification in the Official Gazette).

Section 25FF. Compensation to workmen in case of transfer of undertaking – Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25.F, as if the workman had been retrenched:

Provided that nothing in this section shall apply to a workman in any case where there has been a change of employers by reason of the transfer, if -

(a) the service of the workman has not been interrupted by such transfer;

(b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and

(c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer.

No such legalities have been observed by the Corporation, whereas the petitioners were serving under the erstwhile Corporation upto 14.05.1968 and on a technical retrenchment, they were taken in the service of the T.N.E.B. from 15.5.1968 onwards and, therefore, in terms and condition that is reduced into writing in between the erstwhile Corporation and the T.N.E.B. as against the requirements of law there is no point in much loitering over the terms and conditions reduced into writing at the time of take over and even to the knowledge of the petitioner had they been so, since the position of the petitioners, who are at a disadvantageous position their job being at stake, the respondents cannot take out of the inability of the petitioners and impose conditions of such nature denying the legal rights of the petitioners. As held in the Judgment cited above by the petitioners, wherein regarding the facts it was categorically held that the overriding principle should be that no one should be able to frustrate the intent and purpose of the law by drawing a Corporate veil across the eyes of the Court.

13. Therefore, the conclusions arrived at by the appellate authority based on the mere factual position of the case and merely on a overriding of the conditions imposed without going into the intent and purpose of the law, no decision could be arrived at.

14. In all fairness, the appellate authority has no reason to interfere with the conclusions arrived at by the Controlling Authority, which does not at all suffer from any legal infirmity or inconsistency or illegality or from patent errors of law or perversity. In every respect, the fourth respondent, appellate authority should have only refrained from causing interference into the well considered and merited order passed by the

Controlling Authority.

15. There is no denial of the fact that each petitioner rendered their service for 19 ½ years in the erstwhile South Madras Electric Corporation Limited, Trichy and there cannot be any term or condition put forth either in the agreement or the rules or regulations of the T. N.E.B. while taking over the erstwhile Corporation, which are repugnant to the interest of the labour or denying the legitimate right of the employees, which become only liable to be set aside in limine on the principle of unfair labour practice and, therefore, denying such rights of the petitioners even in law legislated or rule made or agreement entered into are unacceptable since they are opposed to the cardinal principles of labour law and, therefore, no much importance need be attached to those artificially and technically made arrangements either by the erstwhile Corporation or by the T.N.E.B. In short, the petitioners are entitled to all the benefits much less for calculating the whole period of service rendered in the erstwhile South Madras Electric Supply Corporation Limited, Trichy and the T.N.E.B.

In result
(i) all the above writ petitions succeed and they are allowed;
(ii) the order of the fourth respondent dated 27.01.2000 passed in PGA cases No.61 to 63 of 1999 are quashed;
(iii) The order dated 28.04.1998 made in PG Case Nos.25 to 27 of 1 997 by the third respondent is restored.
(iv) Consequently, the first respondent is directed to pay the gratuity for the period from 01.02.1952 to 14.05.1968 in favour of the 1 st and 3rd petitioners and for the period from 16.11.1948 to 14.05.19 68 in favour of the 2nd petitioner.

(v) However, in the circumstance of the case, there shall be no order as to costs.
(vi) W.P.M.P.Nos.1095, 1097 & 4364 of 2001 are closed.

03.07.2002
Index:Yes
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V. KANAGARAJ,J

Order in
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